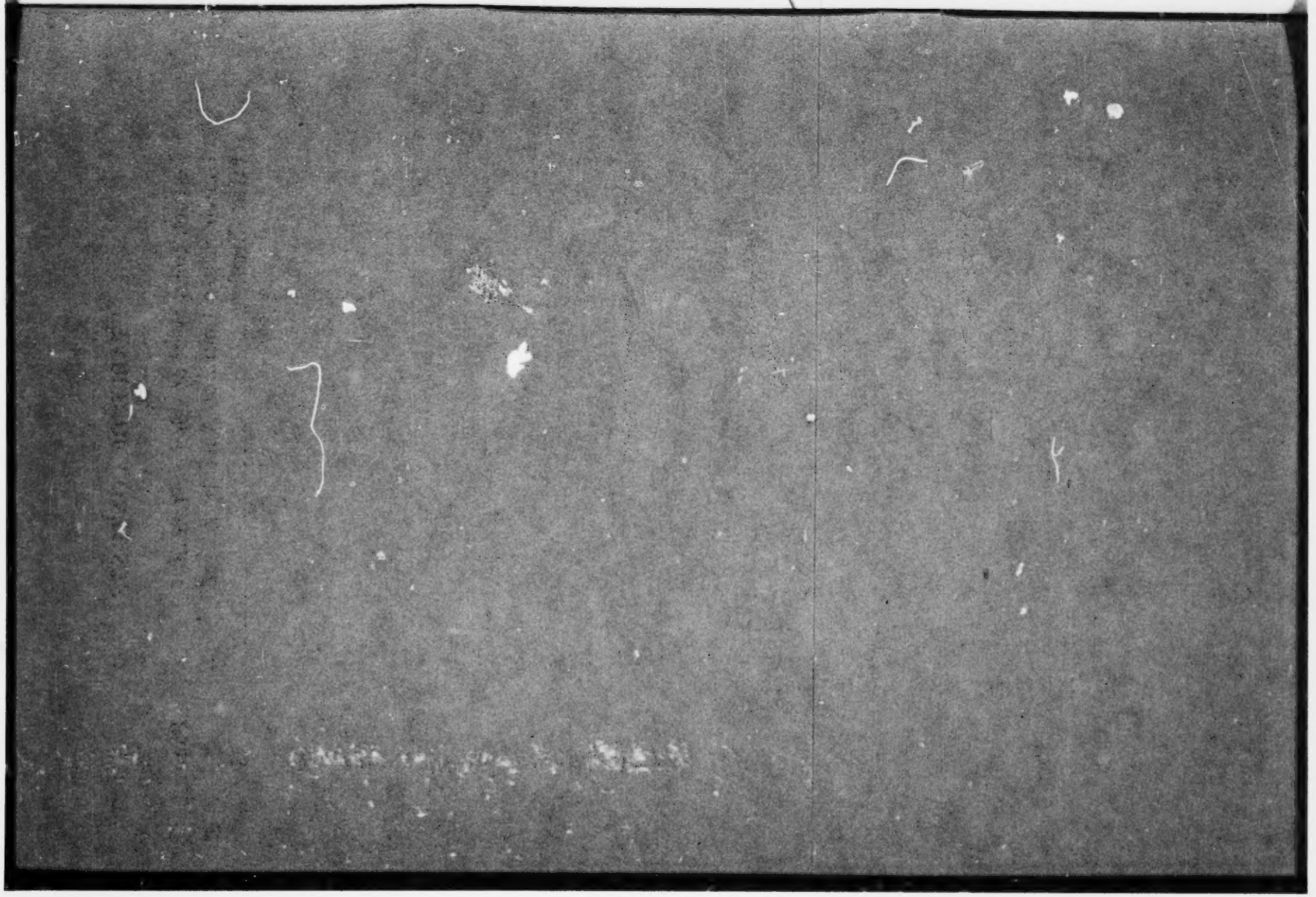


TABLE OF CONTENTS

	Page
Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement	
1. Introduction	3
2. Proceedings Below	3
3. The Dade County School System	7
Reasons for Granting the Writ	
Introduction	10
I. Constitutional Obligation to Correct Imbalance	
1. Whether, as a Constitutional Matter, any Particular Degree of Racial Balance Must be Achieved in Schools.	11
II. Due Process	19
III. Civil Rights Act of 1964	26
Conclusion	29
Certificate of Service	30, 31

TABLE OF AUTHORITIES

Page

Adams v. Mathews,
403 F.2d 181 (5th Cir., 1968) 17, 18

Alexander v. Holmes County Board of Education
396 U.S. 19, 22 (1969) 13, 20, 21, 22, 23

Allen v. Board of Public Instruction of Broward Cty.
— F.2d — (5th Cir., 1970) [No. 30032, Aug. — 1970] 25

Board of Public Instruction of Duval County, Florida v. Braxton,
402 F.2d 900 (5th Cir., 1968) 14

Bradley v. Pinellas County,
Slip dec. No. 28639 — F.2d — (July 1, 1970) 24

Brown v. Board of Education,
347 U.S. 483, (1954) (Brown I) 10

Brown v. Board of Education,
349 U.S. 294, (1955) (Brown II) 10, 23

Carr v. Montgomery Cty. Bd. of Educ.,
—F.2d— (5th Cir., 1970)]No. 29521, June 29, 1970] 24

Deal v. Cincinnati,
419 F.2d 1387 (1969) 14, 15, 16, 17

Ellis v. Board of Public Instruction of Orange County, Fla.,
423 F.2d 203 (5th Cir., 1970) 5, 14, 19

TABLE OF AUTHORITIES (cont.)

Page

Glidden Company v. Zdanok,
370 U.S. 530 (1962) 23, 28

Green v. County School Board of New Kent County,
(1968) 391 U.S. 430 ..... 12, 17, 23

Harvest v. Bd. of Pub. Instruc., of Manatee Cty., Fla.,
— F.2d — (5th Cir., 1970) [No. 29425, June 28, 1970] 24

Katzenback v. Morgan,
384 U.S. 641 (1966) 28

Northcross v. Board of Education of City of Memphis, Tenn.,
302 F.2d 818 (6th Cir., 1962) cert den. 370 U.S. 944 17

Northcross v. Bd. of Education of Memphis,
— U.S. —, 25 L.Ed.2d 246 25

Ross v. Eckels,
Slip Op. No. 30080, Aug. 25, 1970 — F.2d — 24, 25

Shelley v. Kraemer,
334 U.S. 1 (1948) 12

Singleton v. Jackson Separate School District and Carter v. West Feliciana Parish School Board,
(1970) 396 U.S. 290, 24 L.Ed.2d 477, 480, 481 ..... 19, 21, 22, 23, 25

TABLE OF AUTHORITIES (cont.)

	Page
U.S. v. County Board of Elections of Monroe County of New York, 248 F.Supp. 316	27
United States v. Indianola Municipal Separate School District, 410 F.2d 626, 628 (5th Cir., 1969)	13, 14
Valley v. Rapides Parish School Board, Slip Dec. No. 29237, — F.2d — (March 2, 1970)	23, 24

OTHERS

Section 5, 14th Amendment to Constitution	16, 27, 28
Section 401, 42 U.S.C. 2000(c)	26
Section 407, 42 U.S.C. 2000(c) (6)	26

in the
Supreme Court
of the
United States

October Term, 1970

No. _____

DADE COUNTY SCHOOL BOARD, et al.,
Petitioner,

vs.

HERBERT PATE, et al.,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the* United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on August 12, 1970.

* order of the

OPINIONS BELOW

The opinions of the Courts below directly preceding this petition are as follows:

1. Circuit Court of Appeals' Opinion and Order of June 5, 1970. (Appendix p. 76)[1]
2. Opinion and Order of June 26, 1970. (App. p. 20)
3. Opinion and Order of July 24, 1970. (App. p. 51)
4. Order of August 10, 1970. (App. p. 78)
5. Opinion and Order of the Court of Appeals filed August 12, 1970. (App. p. 3)

JURISDICTION

The Judgment of the Court of Appeals was entered on August 12, 1970 (Appendix p. 3). The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether, as a constitutional matter, any particular degree of racial balance must be achieved in the schools.

2. Whether the Circuit Court of Appeals may, summarily and without benefit of the complete record, substitute its judgment for that of the District Court.

3. Whether Congress has the power to define acts which comply with the 14th Amendment and whether such definitions are binding upon this Court.

---

[1]The appendix of opinions below is printed in a separate volume because it is voluminous.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the equal protection clause of the 14th Amendment to the Constitution of the United States.

STATEMENT

1. INTRODUCTION

Petitioners are here seeking review of a decision of the United States Court of Appeals for the Fifth Circuit setting aside certain portions of an order of District Judge C. Clyde Atkins of the Southern District of Florida, the three-member panel consisting of Chief Judge BROWN, Circuit Judge MORGAN and Circuit Judge INGRAHAM. Brown, Morgan and Ingraham brushed aside the practical and educational factors as determined by the District Court and ordered massive rezoning, pairing and grouping throughout the Dade County School System to achieve a degree of racial balance; said order requiring extensive additional transportation to achieve such balance.

2. PROCEEDINGS BELOW

The Dade County School Board, unlike many southern boards, is in Federal Court as a result of its own positive action. In response to a directive issued by the Department of Health, Education and Welfare, the School Board was finalizing a plan for desegregation during the summer of 1969. An individual named Pate filed a suit in the State Court seeking to enjoin the School Board from implementing its desegregation plan. The Board petitioned to remove and the case was retained by the District Court after a motion for remand. [Order of District Court, January 26, 1970. (Appendix p. 124)].

The plan submitted contained this prefatory statement:

> "The Dade County School Board recognizes its affirmative responsibility to provide a desegregated, unitary and non-racial school system within which no person is to be effectively excluded from any school because of race or color, and it recognizes its responsibility to assign teachers without regard to race so that the schools throughout the system are not racially identifiable by their faculties."

The Petitioner submitted a residential-zone-of-attendance plan to the District Court. It eliminated all dual or optional attendance zones. Under this plan each student was required to attend the school serving his attendance zone except for compelling non-racial reasons. The plan contains some variations from the residential zones of attendance consisting of pairing of two elementary schools in the Hialeah area and two elementary schools in the South Dade area, the paired schools being located less than a mile apart in each instance.

The District Court, in an order dated January 26, 1970, (Appendix p. 124) held that a plan in which there remained 21 all-black schools did not meet the constitutional standards for a unitary school system. This holding was appealed by the Petitioner. The District Court also held that since there was no suitable plan available that the pupil assignment portion of the plan must be implemented by no later than September 1, 1970. This holding was appealed by defendants Love, et. al., seeking immediate implementation.

On February 17, 1970, the Court of Appeals in *Ellis v. Board of Public Instruction of Orange County, Fla.*, 423 F.2d(2) 203, recognized, in the urban context, that a plan in which some all-black schools remained met the requirements of a unitary school system. This rendered Petitioner's appeal moot. The petitioners Love, et. al., did not further prosecute their appeal and it became moot upon the closing of school, June 9, 1970.

The Court of Appeals, however, retained jurisdiction of the cause on its own initiative. (Order of June 5, 1970, Appendix p. 76).

As reflected in the findings of fact by the District Court in its Order of June 26, 1970, (Appendix p. 20), it was estimated that 244,000 students were expected to enroll in Dade County schools on August 31, 1970, of which 57,900, or 23%, would be black. There is no challenge to five of the six elements required to constitute a unitary school system. Only the criteria used in the assignment of pupils is challenged in this case.

The plan submitted by the Board allowed 20 schools to remain with 100% black enrollments. Additionally, there were to be 16 schools with various percentages of black enrollments ranging from 99% down to 85%. (Order of June 26, 1970, Appendix p. 20).

The District Court, in a series of orders dated June 26, July 24 and August 10, 1970, superimposed upon the Petitioner's residence-zone-of-attendance plan approximately eight modifications. (Appendix p. 20, 51, 78). The plan, as modified by the District Court, retained 22 schools which would have remained all or virtually all-negro (15% or less white), housing 44% of the negro school population. The judgment of the Fifth Circuit Court of Appeals superimposed 26 more schools upon the modifications approved

by the District Court. The Circuit Court of Appeals' modifications consisted of pairing, grouping and rezoning of schools. The Court of Appeals reduced the number of black students attending virtually-all-black schools from 44% to 24%. (Opinion August 12, 1970, Appendix p. 3). The Court of Appeals determined that a school was not desegregated unless populated by at least 15% the minority race of that school.

District Judge C. Clyde Atkins first heard testimony in the case in August of 1969, entering his initial opinion on August 29, 1969 (Appendix p. 118). Entering an order approving the interim plan submitted by the petitioner but requiring further reports to be made, the District Judge held additional hearings in January of 1970, resulting in his order of January 26, 1970, requiring the assignment of the teaching staff on the basis of the ratio of black teachers employed by the School System to white teachers so employed in each the elementary, junior high schools and high school levels. The next hearings conducted by Judge Atkins were on Jan. 30, Feb. 2, Feb. 3, April 16, May 22 and June 8, 1970, resulting in a series of orders of June 26, July 24 and August 10, 1970. Reports were required by the Court from the School Board throughout the course of the entire year as to matters pertinent to the process of desegregation of Dade County Schools, which reports were meticulously studied as well as the evidence taken before the District Judge prior to the entry of the last series of orders. The Court of Appeals entered its opinion and judgment on August 12, 1970, without the benefit of a transcript of the testimony taken in the case after Feb. 3, 1970, without the benefit of the submission of briefs or appendices, and without the submission of oral argument by counsel, exactly two days after the final action of the District Court.

3. THE DADE COUNTY SCHOOL SYSTEM

1969-1970

The petitioners presented to the District Court detailed evidence about the School System such as the number and location of the schools, the grades served, the kinds of programs offered, the racial distribution of students and faculties in the system and the changes which had occurred over the years. The petitioner showed also that the Dade County School System was severely impacted by the arrival of great numbers of Cuban refugees, many of whom were non-English-speaking. The petitioner showed that in the nearly one decade from 1960 when the Cuban in-migration commenced, a system for handling non-English-speaking students had been devised and that a number of the schools in Dade County were established as Cuban orientation schools — schools in which English was taught as a second language, schools in which there were special staffs in attendance to expedite the procedure of orienting non-English-speaking students and melding them into the school system without unduly damaging the educational process for the native-born Americans. (App. p. 142 July 6, 1970 Report). The petitioners showed by expert testimony that there were many portions of the urban areas of Dade County in which the pairing or grouping of schools would create almost insurmountable problems concerning the danger to children of tender years in attendance at such schools. (App. p. 51 July 24, Order). The petitioners also showed that the population of Dade County contained in certain areas large pockets of negroes, said negro residential areas being densely populated, and one such area extending 50 blocks north and south and 30 blocks east and west, in which there were located 18 ele-

mentary and junior high schools plus one senior high school. (Appendix p. 239). The testimony submitted indicated that the racial segregation of population in Dade County was not the result of man-made laws. (App. p. 129 See Exhibit #10, 1970).

The Court, carefully considering the voluminous evidence before it, made extensive findings of fact, required numbers of special reports to be submitted by the School Board staff, and in a series of orders reflected a comprehensive analysis of the submissions of evidence by the parties. The Court of Appeals has accepted the District Court's findings (compare Order of June 26, 1970, with Opinion of August 12, 1970, Appendix P. 20 and 3) and has not found the District Court's conclusions to be clearly erroneous. The Court of Appeals struck down the School Board's plan and the modifications of the District Court thereto, out of its fascination with the prospect of reducing the number of black students in all-black schools or virtually-all-black schools to less than 25%. The Court of Appeals, supporting the District Court, has also made a finding (Opinion August 12, 1970, Order July 24, 1970) that a school which is populated by less than 15% of the minority race attending such school is a school which is not desegregated. The Dade County School System serves nearly a quarter of a million pupils. The District Court, on February 3, 1970 (App. p. 138), made findings of fact accepted by the Circuit Court of Appeals that of the 244,000 students expected in the 1970-1971 school year, that 57,911 would be black; that of 218 schools, 148 would be integrated; and that the racial composition of the student bodies of 20 of these schools would be all-black; that the 20 all-black schools are located where a high concentration

of black people live; that the desegregation of the 20 all-black schools would require transportation beyond the attendance zones established for those schools; that by transporting 14,000 students five to six miles, one all-black high school and four all-black junior high schools could be integrated; that the transportation costs, exclusive of acquisition of buses, were between $50.00 and $75.00 per pupil; and that the Board has utilized its allotted full tax millage and is urgently in need of more funds. The District Court also made a finding with regard to the Cuban orientation schools and in the main refused to pair them with all-black schools, making a finding of fact that to do so might create a school which to outward appearances was integrated but which would be segregated by language from within. (See order of July 24, 1970, Appendix p. 51). The District Court did not find that residential patterns leading to segregation in the schools resulted from federal, state and local governmental action. The only evidence before the Court was that there was no statute on the books of the State of Florida, no ordinance on the books of the County of Dade, and no ordinance on the books of the major municipalities of the county which require any person to live in any particular area of the community because of race or color. (Exh. 10 App.endix p. 129). It should be noted that the objectors to the School Board's plan in the District Court offered no alternative plan for the desegregation of the Dade County schools, and that the Court of Appeals, without the benefit of the entire record, brushed aside the findings and consideration of the District Court and, engrossed with statistics, ordered massive pairings and groupings of schools in an attempt to achieve a degree of racial balance.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case merits review on certiorari because it involves important legal questions of implementation under *Brown v. Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), and because it will have important consequences and lay out guidelines with respect to future school desegregation. The major questions presented are the related issues about the proper formulation of specific desegregation goals and the proper standard for appellate review of a decision on the feasibility of a desegregation plan. The case also merits review upon the question of procedural due process. Was it accorded the petitioner where the Court of Appeals reversed the lower court two days after its final order without considering a complete record from the District Court.

There should be no constitutional concern with the degree of desegregation achieved by the plan. This Court should consider whether any particular degree of racial balance is required in a school to constitute a desegregated school.

I.

CONSTITUTIONAL OBLIGATION TO CORRECT IMBALANCE

1. WHETHER, AS A CONSTITUTIONAL MATTER, ANY PARTICULAR DEGREE OF RACIAL BALANCE MUST BE ACHIEVED IN SCHOOLS.

If there is a constitutional obligation to correct the racial imbalance which exists in the public schools of some communities, it must be derived from the mandate of the 14th Amendment which prohibits state governments from denying any of its citizens equal protection of the laws. Thus, it must be determined first that the inaction of state government is responsible for the creation and maintenance of imbalanced schools, and second, that the creation and maintenance of such schools amounts to a denial of equal protection of the laws. Governmental responsibility for the imbalance is determined in those instances in which the government, i.e., school board, provides a system for freedom of transfer for whites and restriction of transfer for blacks. Evidence of governmental involvement may be shown by the active gerrymandering of (the) zones of attendance by a School Board. However, governmental responsibility is absent where fair and impartial zones of attendance are established which can, to the highest practicable degree, provide for desegregation of the races in the public schools (rule of reason). The use of geographic criteria in a fair manner does not produce any aura of governmental culpability or responsibility. However, geographic criteria, improperly used, such as gerrymandering, or disregard of results, can

cause a suspicion of governmental responsibility. It is necessary in order for the school board to be held to be at fault that a claimant show that the Board consciously avoided the more rational alternatives. *Green v. County School Board of New Kent County* 391 U.S. 430 (1968). School Board involvement cannot be inferred from a failure of governmental agencies to prohibit racial discrimination in housing and employment since these are factors over which the school board has no control. There is no governmental involvement in the insertion of racial clauses in deeds by land developers. These restrictions cannot be credited to the public authority, especially since 1948, the year in which *Shelley v. Kraemer*, 334 U.S. 1 (1948), was decided.

Again, when we consider racial imbalance, we are confronted with the problem of the courts in defining what is socially desirable rather than what is constitutionally mandated. The constitutional principle of equality of educational opportunity is met by a school system which has carefully studied the alternatives and has produced geographic criteria in designating zones of attendance.

Certainly there is equality of educational opportunity if each child may attend a school in his zone of residence as a matter of right and, also, where each child may transfer out of a school in which his race constitutes the majority to a school in which his race constitutes the minority. The opportunity of attending a desegregated school is thereby guaranteed to all. Equality of educational opportunity becomes even more apparent when consideration is given the fact that in this school system faculty assignments are on the basis of a direct ratio of the number of blacks to whites employed in each of the three categories

of instructional personnel — elementary, junior high school and senior high school.

The remedy prescribed by the 14th Amendment is not one that is punitive, or in any way seeks retribution for past sins. It merely requires that every child have equal opportunity for education. It requires that no child be effectively barred from attendance at any school because of race or color. *Alexander v. Holmes*, 396 U.S. 19 (1969).

It is submitted that in a school system such as Dade County's, where the boundary lines for the zones of attendance are drawn without regard to race or color and where zones of dual or optional attendance have been eliminated, and where there has been established a system of teacher assignment based on the ratio of black to white in each school of the system, and where there is no discrimination claimed or shown by any of the parties to this suit with regard to transportation, extra curricular activity and the selection of sites for new schools, that there can be no doubt that the last vestiges of the dual system have been eliminated, root and branch.

The Court of Appeals cites the case of *United States v. Indianola Municipal Separate School District*, 410 F.2d 626, 628 (5th Cir. 1969) in which the school board urged certain problems as natural barriers, the existence of a swamp for the laying of its boundary lines in a plan which had zones of attendance and a freedom of choice. It is submitted that this is a gross misapplication of law. To compare a metropolitan system in which there is substantial desegregation, in which 155 of the 218 schools in the community accommodate both black and white, with a rural county system in which there are four schools,

two all white and two all black, is obviously improper. (Appendix p. 82). The language in *Indianola* states that the obstacles to implementation of the HEW plan "cannot be accepted if the (board's) plan's implementation fails to result in substantial desegregation." Certainly this is true in a case where there is no desegregation of the public schools by the plan.

It is submitted that the Court must recognize, as did *Ellis v. The Board of Public Instruction of Orange County, Florida*, 423 F.2d 203 (5 Cir., 1970), as did *Deal v. Cincinnati*, 419 F.2d 1387 (1969), as did *Board of Public Instruction of Duval County, Florida v. Braxton*, 402 F.2d 900 (5 Cir. 1968), that there are urban areas in which the problems of desegregation vary materially and vastly from those of rural school districts. The Court must recognize that there is a difference in the decision and the pronouncements laid down for such rural areas and in larger metropolitan areas of the country.

It is time that the *de facto-de jure* myth be laid to rest by this Court. While it is true that in most southern states, including Florida, there have been laws requiring separate educational facilities for black and white, miscegenation laws and certain discriminatory public facilities laws, there has never been in Florida a statute requiring the residence of blacks or whites in any particular sector of any community in the state. Likewise, there has never been an ordinance in Dade County, the City of Miami, the City of Coral Gables or the City of Miami Beach, the principal cities of Dade County, which requires black people to live in one sector of town and whites to live in another. See Exhibit #10, February 2, 1970 (App. p. 129)

It is submitted that there have been no such discriminatory laws in existence for many years in the northern cities which have had segregation problems, namely, Cincinnati, Gary, Cleveland, New York, Philadelphia and others.

However, let us observe what has happened to the racial patterns both in Dade County and in these northern cities. Racial patterns of residence have been set up regardless of the existence or absence of discriminatory laws. It is interesting to compare Cincinnati with Dade County, and the statistics concerning Cincinnati are taken from the case of *Deal v. Cincinnati*, 419 F.2d 1387 (1969). In Dade County there had been discriminatory laws in existence. In Cincinnati there had been no discriminatory laws on the books of the State of Ohio for more than one hundred years at the time of the decision in *Deal*.

What happened in Dade? The vast majority of the blacks resided in all-black residence patterns.

What happened in Cincinnati? The vast majority of the blacks resided in all-black residential patterns.

Surely, since these patterns of residence are repeated over and over again in the urban areas both in the north and in the south, the Court must recognize that ethnic groups have historically clung together. It is submitted that ethnic groups of all kinds have traditionally adopted patterns of residence which bear no relationship to the laws made by governments.

Does the Constitution command that the black and white children be distributed throughout the school system

according to the ratio of black pupils to the total number of students in the school system in each school? This is not the case. In the case of assignment of teachers, the rationale of racial assignments is to assure equality of educational opportunity. It is submitted that equality of educational opportunity is what is mandated by the 14th Amendment and not racial balance in each school in a school system. The rationale present in the assignment of teachers is absent in the assignment of school children. If the Court seeks to remedy imbalance of the races in attendance in each of the schools of a school system, certain basic constitutional rights of children involved are violated.

It is submitted that the pairing or grouping solution to this problem is at best a stopgap which seeks to impose upon school boards the total solution of a problem created by other factors than those under the control of the school systems. There are strong reasons which support the neighborhood school concept in the United States, and as is stated in *Deal v. Cincinnati*, supra at p. 1391:

> "The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as the minimization of safety hazards to children reaching school, economy of costs in reducing transportation needs; ease of pupil placement and administration through the use of neutral, easily-determined standards and better home-school communication."

Deal also held that the constitution imposes no duty to bus whites and negroes away from the districts of their

residences in order that racial complexion should be balanced and that such busing violates the rights of negro and white alike.

In *Deal* as in the present case, there was a high correlation in the distribution of negroes throughout the school system to the general neighborhood residential patterns. There were in *Deal*, as there are in Dade County, many areas formerly predominately white which have changed to predominately negro by the movement of negroes into the new neighborhoods and this is reflected in the increase in the number of negro children attending schools there. (Appendix, p. 239).

In the case of *Northcross v. Board of Education of City of Memphis, Tenn.*, 302 F.2d 818 (6th Cir., 1962) cert den. 370 U.S. 944, it was stated: (p. 823):

> "Minimal requirements for non-racial schools are geographic zoning according to the capacity and facilities of the buildings, and admission to a school according to residence as a matter of right."

There is conflict in the Fifth Circuit as evidenced by the decision in the present case contrasted with *Adams v. Mathews*, 403 F.2d 181, (5th Cir., 1968), which stated: (p. 188)

> "If, in a school district, there are still all negro schools or only a small fraction of negroes enrolled in white schools, and no substantial integration of facilities and school activities, then, as a matter of law the existing plan fails to meet the constitutional standards as established in *Green*."

In the instant case, the Fifth Circuit approved the plan with modifications in which there remained, according to its own sophisticated manner of determination, some 14 all-black schools.

Adams, of course, involved 40 rural school districts. In all of these counties, little or no progress has been made in the desegregation of schools at the time of the opinion. In most of them no progress whatsoever has been made prior to the 1964 Civil Rights Act. A vast majority of the districts had been in litigation brought by black plaintiffs or by the United States Attorney and had been in litigation for many years. All had plans and counter-plans in existence as submitted either by local board, HEW, or the area desegregation center. It is submitted that none of the last delineated facts apply to Dade County, a county which had commenced its efforts in desegregation as early as 1959, which had at the commencement of the 1968-1969 school year 134 integrated schools, a community which has led the state and the south in its effort to desegregate schools. (Appendix p. 133-135). It is submitted that the language contained in *Adams* applied to districts which might be similar to New Kent County. Virginia, but not to an urban area containing resident patterns of black and white and mixed, such as Dade County. It must be read into that decision that the language above-quoted applies only to counties falling in the category of those involved in *Adams*.

Therefore, it is submitted that if the courts concern themselves with any particular degree of racial balance, the federal judiciary will engage in a gigantic numbers game, the result of which no one can predict.

II.

DUE PROCESS

WHETHER THE CIRCUIT COURT OF APPEALS MAY SUMMARILY AND WITHOUT BENEFIT OF THE COMPLETE RECORD, SUBSTITUTE ITS JUDGMENT FOR THAT OF THE DISTRICT COURT.

This case was appealed to the Court of Appeals on January 26, 1970, by the Intervenors LOVE, et al., the style of the case being: ALICE LOVE, et al., Intervenors-Appellants, vs. DADE COUNTY SCHOOL BOARD, et al., Defendants-Appellees, No. 29179.

The thrust of Love's appeal was that the pupil desegregation portion of the plan should be implemented immediately.

On January 30, 1970, the Petitioner filed a Cross Appeal challenging that portion of the District Court's order which held that a plan in which there would remain 21 all-black schools fails to meet the constitutional requirements for a unitary school system. The Petitioner's appeal was rendered moot with the rendition of the *Ellis* decision, supra, the 5th day of June, 1970.

The Love appeal was rendered moot by the closing of school and due to the fact that counsel for Love did not continue with the steps in appealing as required by the Rules of Appellate Procedure as amended by *Singleton.*

The Fifth Circuit, however, regardless of the abandonment of these appeals on June 5, 1970, issued a mandate retaining jurisdiction of the case and ordering the District Court to submit to it the final plan for desegregation when approved by the District Court.

Shortly after the order of June 26, 1970 (Appendix p. 20), Appellant Love filed an additional appeal, the notice of appeal being dated July 15, 1970. However, subsequent to the filing of said appeal, the Court entered its order of July 24, 1970 (Appendix p. 51) and subsequent to that entered its order of August 10, 1970 (Appendix p. 78) finalizing the approval of a plan for desegregation of the Dade County Schools.

The Fifth Circuit entered its opinion, mandate and order on opinion on August 12, 1970 (Appendix p. 3).

There was, at this time, no pending appeal save and except that of the Intervenors LOVE, et al., no record had been compiled and sent to the Court of Appeals by any litigant and no transcript of testimony had been written up subsequent to the hearing of February 3, 1970, although testimony had been taken in hearings conducted on March 13, 1970, April 2, 1970, May 11, 1970, May 22, 1970, June 8, 1970, June 12, 1970, July 13, 1970, and July 31, 1970.

The case of *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 22, set a dangerous precedent when it ordered the Court of Appeals to oversee the progress of desegregation in various school districts in the Fifth Circuit. In this case this Court said that while a school system is being operated as a unitary system,

a district court may hear and consider objections or proposed amendments, provided, however, that the Court of Appeals' order shall be complied with in all respects. The case further provided "that no amendment shall become effective before being passed upon by the Court of Appeals."

In Paragraph 4 of the opinion the following language appears:

> "The Court of Appeals shall retain jurisdiction to insure prompt and faithful compliance with its order, and may modify or amend the same as may be deemed necessary and desirable for the operation of a unitary school system."

It is apparent that in the present case the Fifth Circuit was attempting to comply with *Alexander v. Holmes*, supra, and to supervise the desegregation process in Dade County. However, this Court has with a very few words struck at the very core of the judicial system of the United States rendering a Court of Appeals as an administrative body, granting it power to supervise the desegregation process regardless of whether or not an appeal has been perfected, and in the case of the Fifth Circuit in the present case, given them the impression that they had the right to reverse the findings of the District Court where no appeal was pending, where no complete record was present for contemplation by the Court, and without briefs or oral argument.

The language of *Carter v. West Feliciana Parish School Board* and *Singleton v. Jackson Separate School District*, 396 U.S. 290 24 L.Ed. 477, 480, 481 (1970), is

interesting to note the dissent of Chief Justice Burger and Mr. Justice Stewart:

> "We would not peremptorily reverse the judgments of the Court of Appeals for the Fifth Circuit. That Court, sitting en banc, and acting unanimously after our decision in *Alexander v. Holmes County Board of Education*, 396 U.S. 19, has required the respondents to effect desegregation in their public schools by February 1, 1970, save for the student bodies which are to be wholly desegregated during the current year — no later than September. In light of the measures the Court of Appeals has directed the respondent school district to undertake, with total desegregation required for the upcoming school year, we are not prepared summarily to set aside its judgments. That Court is far more familiar than we with the various situations of the several school districts, some large, some small, some rural, some metropolitan, and has exhibited responsibility and fidelity to the objectives of our holdings in school desegregation cases. To say peremptorily that the Court of Appeals erred in its application of the *Alexander* doctrine to these cases and to direct summary reversal without argument and without opportunity for exploration of the varying problems of the individual school districts seems unsound to us."

That dissent can be applied almost directly to the actions of the Fifth Circuit in peremptorily reversing the District Court.

The problem stems not so much from a willfulness on the part of the Fifth Circuit Court of Appeals but with the precedent set in *Alexander v. Holmes County*, supra, it is submitted that it is illogical and unsound to constitute the Courts of Appeal as administrative bodies. It is a sounder judicial procedure to leave the finding of facts to the lower court, and reserving the Court of Appeals review based upon proper standards of appellate procedure, namely error in the finding of facts or misapplication of the law to the facts of the case.

If this court intended to so constitute the Circuit Courts of Appeal, then such decision should be repudiated. While the doctrine of stare decisis is important in most fields of law, it has never been strictly applied in the field of constitutional law. See *Glidden Company v. Zdanok*, 370 U.S. 530 (1962).

Decisions of *Holmes*, supra, *Singleton*, supra, and *Green*, supra, have directed the Courts of Appeals to abandon the precedent of acting "with all deliberate speed" enunciated in *Brown II* and to act immediately so that the Court seems to have placed haste before any and all other considerations in school cases. Examples are the error created by premature decisions by the Fifth Circuit found in the case of *Valley v. Rapides Parish School Board*, Slip Decision No. 29237, ____ F.2d ____, of March 2, 1970, in which the Court found the plan of January 16 as amended by an order of January 30, 1970, to be constitutionally unsound; however, after submitting its March 2, 1970 opinion found that the lower court had approved another plan on February 24, 1970, therefore had to withdraw the March 2, 1970 opinion and substituted *Valley v.*

Rapides Parish School Board, Slip Decision 29237 of March 6, 1970, in its place. The Court had entered an opinion without the benefit of the record.

In the case of *Bradley v. Pinellas County*, Slip Decision No. 28639, ____ F.2d ____, of July 1, 1970, the Fifth Circuit in its haste to implement a policy of desegregation, acted prematurely in rendering its decision based on the population maps of earlier years so that upon petition for rehearing the Fifth Circuit was again forced to recall its opinion and to change it in compliance with the current record. (See *Bradley v. Pinellas County*, Slip Decision No. 28639, of July 29, 1970, ____ F.2d ____.) The case of *Ross vs. Eckels* (Slip Opinion No. 30080, August 25, 1970, ____ F.2d ____) was another case which was hurriedly considered just prior to the opening of the 1970-1971 school session. As was stated in a dissent by Circuit Judge Clark:

> "Since abuse of discretion is this circuit's test for the validity of a district court's school plan, *Harvest v. Bd. of Pub. Instruc. of Manatee Cty, Fla.*, ____ F.2d ____ (5th Cir. 1970) [No. 29425, June 28, 1970], I believe we err when we substitute our judgment, based upon documents and maps, for that of the district court whose decision is based upon flesh and blood contact with the real people and actual problems of this district. *See Carr v. Montgomery Cty. Bd. of Educ.*, ____ F.2d ____ (5th Cir. 1970) [No. 29521, June 29, 1970]."

Judge Clark stated further, in Slip Decision No. 30080, at Page 23:

> "There is only one answer. It is rapidly becoming apparent that despite express disclaimers [*See Singleton v. Jackson Municipal Separate School Dist.*, ____ F.2d ____ (5th Cir. 1970) [No. 29226, August 12, 1970] [Footnote 5, Slip Op., p. 4]], the special school case panels of this circuit are now out ahead of the requirements laid down by the Supreme Court and have adopted *sub silento* some unmentionable standard of numerical pupil racial balance to govern the affirmance or reversal of school case decisions.[1] For the good of the schools and pupils of this circuit, I for one do not understand why the 'magic figures' must remain a mystery enshrouded in nebulous phrasing that says that the plan adopted is 'ineffective' or 'unacceptable'.

The logic of this dissent is impeccable when he indicates that there will never be an end to the litigating of such "numbers game" cases. The principle underlying the reversal in *Ross v. Eckels* was that the indicated school system did not achieve that degree of racial balance that some of the judges of the Circuit have declared is "enough".

A Court of Appeals errs when it substitutes its own findings for that of the District Court and such ruling is premature where neither the revised plan nor the revised school zones and updated enrollment figures ordered filed by the lower court were properly before the Court of Appeals for review. *Northcross v. Bd. of Education of Memphis*, ____ U.S. ____, 25 L.Ed.2d 246.

"[1]The most recent of these opinions are collated in *Allen v. Bd. of Public Instruc. of Broward Cty.*, ____ F.2d ____ (5th Cir. 1970) [No. 30032, August , 1970]."

This Court must, at this time, determine the true goals for desegregation. If it is to be simply that it should be a school system in which no person is barred from attendance at the school of his choice because of race or color, then this must be reaffirmed by the Court. If the Court is to rule that the Constitution is concerned with the percentages which apparently have engrossed the Fifth Circuit Court of Appeals then it is time that the guidelines be laid down so that the school districts may plan with precision and not by "some unmentionable standard of numerical pupil racial balance."

III.

CIVIL RIGHTS ACT OF 1964

3. WHETHER CONGRESS HAS THE POWER TO DEFINE ACTS WHICH COMPLY WITH THE 14TH AMENDMENT AND WHETHER SUCH DEFINITIONS ARE BINDING UPON THIS COURT.

Section 401, 42 U.S.C. 2000 (c) provides the definition of desegregation as follows:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion or national origin, 'desegregation' shall not mean the assignment of students in order to overcome racial imbalance."

Section 407, 42 U.S.C. 2000 (C) (6) further defines desegregation as follows:

> ". . . provided that nothing herein shall empower any official or court of the United States to issue any orders seeking to achieve a racial balance

> in any school by requiring the transportation of pupils or students from one school to another or from one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

These provisions enacted by Congress effectively limit the definition of desegregation which may be promulgated by the courts. The question is, then, are such statutory provisions enacted by Congress binding upon the Supreme Court and other Federal courts. The answer is yes. The 13th, 14th and 15th Amendments are unique in the Constitution in that after providing for substantive provisions, each contains a grant of power of enforcement. Section 5 of the 14th Amendment constitutes a grant of power to the Congress. It is as follows:

> "Congress shall have power to enforce by appropriate legislation the provisions of this Article."

This grant of power, the Courts have held, gives Congress the power to determine for itself what patterns of activity contravene the 14th Amendment rights. It follows logically that if the Congress has the power to determine what activities contravene the 14th Amendment, Congress has the power to define actions which comply with the 14th Amendment. See *U.S. v. County Board of Elections of Monroe County of New York*, 248 F.Supp. 316, a case in which a three-judge panel held as follows:

> "Inherent in the power to enforce the 14th Amendment, Congress must be considered as having some latitude to determine for itself what

> patterns of activity contravene the 14th Amendment rights."

Thus, Congress had the power to determine a state-imposed restriction on the right to vote to those who could read, write and interpret the English language to be violative of the 14th Amendment because in its own enactment Congress had stated that a person was entitled to vote who had attended through the 6th grade in Puerto Rico in a public school in which the language was other than the English language, the party of the suit having completed the 9th grade in Puerto Rican schools but being unable to read or write the English language. Thus a state statute was overturned by Congressional act under the authority of Section 5, of the XIV Amendment. Affirmed sub nom *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Now, does Congress have the power to declaim by legislation its disagreement of the Supreme Court's constitutional interpretation? This Court said yes, in the case of *Glidden Company v. Zdanok*, 370 U.S. 530 (1962). In this case the Supreme Court had reversed its earlier holdings in which the United States Court of Claims had been held not to be constitutional courts. Subsequent to the earlier case Congress enacted a provision as follows:

> "Such court is hereby declared to be a court established under Article III of the United States Constitution."

The Supreme Court in *Zdanok* gave credence and special weight to the Congressional enactment reversing its earlier decisions in this regard. Therefore, it is submitted that this Court has ample precedent that Section 407, 42 U.S.C. 2000 (C) (6) governs.

CONCLUSION

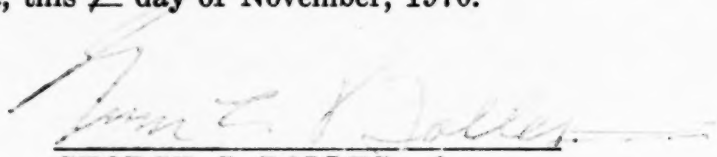
For the foregoing reasons it is respectfully submitted that the petitioner's writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GEORGE C. BOLLES, of
Bolles, Goodwin, Ryskamp & Ware
Attorney for Petitioners
401 City National Bank Building
Miami, Florida 33130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for a Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit was mailed to the following list of attorneys of record in this cause, this 4 day of November, 1970.



GEORGE C. BOLLES, of
Bolles, Goodwin, Ryskamp & Ware
Attorneys for Petitioners
401 City National Bank Building
Miami, Florida 33130

Richard Yale Feder, Esq.
11th Floor
Roberts Building
Miami, Florida 33130

William A. Frieder, Esq.
8851 S.W. 92 Avenue
Miami, Florida 33156

James W. Matthews, Esq.
Matthews, Braynon & Mapp
5022 N.W. Seventh Avenue
Miami, Florida 33127

James E. Glass, Esq.
Ainsley Building
Miami, Florida 33132

Hilery F. Silverman, Esq.
1406 Biscayne Building
Miami, Florida 33130

Hon. Claude R. Kirk, Jr.
Governor of Florida
The Capitol
Tallahassee, Florida 32304

Hon. Earl Faircloth
Attorney General of Florida
The Capitol
Tallahassee, Florida 32304

Thomas H. Anderson, Esq.
Shutts & Bowen
1000 First National Bank Bldg.
Miami, Florida 33131

Rivers Buford, Esq.
General Counsel
State Board of Education
Tallahassee, Florida 32304

Howell L. Ferguson, Esq.
Legal Services Program, Inc.
3600 Grand Avenue
Miami, Florida 33133

CERTIFICATE OF SERVICE (cont.)

Larry S. Stewart, Esq.
Frates, Fay, Floyd & Pearson
Concord Building
Miami, Florida 33130

Tobias Simon, Esq.
223 S.E. First Street
Miami, Florida 33131

Daniel Neal Heller, Esq.
Attorney at Law
1205 Ainsley Building
Miami, Florida 33132

Lane & Mitchell
902 Roberts Building
28 West Flagler Street
Miami, Florida 33130

William M. Manker, Esq.
Manker & White
1004 Northeast Airlines Bldg.
Miami, Florida 33132

William L. Gray, III, Esq.
Blackwell, Walker & Gray
100 N.E. First Avenue
Miami, Florida 33130

J. E. Ludick, Esq.
Ludick, Hunt & Hamilton
12595 N.E. Seventh Avenue
Miami, Florida 33161

Aaron A. Foosaner, Esq.
Foosaner, Barest & Hamilton
Roberts Building, Penthouse 1
Miami, Florida 33130

Robert R. Frank, Esq.
Frank, Stralkow & Marx
1335 Lincoln Road
Miami Beach, Florida 33139

Paul B. Steinberg, Esq.
350 Lincoln Road
Miami Beach, Florida 33139

Henry A. Edgar, Jr., Esq.
Ward & Ward
1240 DuPont Building
Miami, Florida 33131

Mr. Alan H. Rosenson
4090 Battersea Road
Coconut Grove, Florida 33133

Wicker, Smith, Pyszka,
Blomqvist & Davant
Biscayne Building
Miami, Florida 33130

Hon. William C. Cramer
U. S. House of Representatives
2370 Rayburn Office Building
Washington, D.C. 20025